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CIVIL CONTEMPT IN THE DISTRICT OF COLUMBIA COURTS

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Mr. GLENN, from the Committee on Governmental Affairs, submitted the following

REPORT

The District of Columbia Civil Contempt Imprisonment Limitation Act of 1989, Public Law 101-97 (the "Act"), required the Committee on Governmental Affairs of the Senate (the "Committee"), together with the Committee on the District of Columbia of the House of Representatives, to conduct a study of current law and procedures with respect to civil contempt in the courts of the District of Columbia. Further, the Act required the Committee on Governmental Affairs to submit a report on its study, including recommendations regarding changes in current law, if any. This report is submitted to comply with that requirement.

The Committee on the Judiciary of the Senate was similarly charged with conducting a study and issuing a report with respect to civil contempt in the courts of the United States.

I. BACKGROUND

District of Columbia law (D.C. Code secs. 11-944, 11-741) authorizes trial and appellate court judges to hold an individual in civil contempt for failure to obey a court order. Under those sections, an individual can be incarcerated at the court's discretion for an indefinite period of time until he or she complies with the court's order. Thus, the purpose of civil contempt is coercive—to induce recalcitrant people to obey the court.

The District of Columbia Civil Contempt Imprisonment Limitation Act of 1989 limits to 12 months the length of time for which an individual may be incarcerated for civil contempt in child custody cases in the courts of the District of Columbia and provides an expedited appeal in such cases. The District of Columbia Court of Appeals is required by the Act to hear appeals from findings of contempt within 60 days of the request for an appeal. In addition,

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the Act sets forth time limits for instituting criminal contempt proceedings against civil contemnors and provides for up to an additional 6 months of incarceration while a criminal contempt proceeding is pending.

The issues addressed in the Act came to public attention as a result of the case of Dr. Elizabeth Morgan, who had been incarcerated under D.C. law for nearly two years for refusing to comply with a court order that she disclose the whereabouts of her minor daughter so that her former husband, the child's father, could exercise his visitation rights. Dr. Morgan's justification for her refusal to comply with the court order was that she believed her former husband, Dr. Eric Foretich, had sexually abused their daughter. The trial court judge had found insufficient evidence of sexual abuse to rescind Dr. Foretich's visitation rights and, therefore, found Dr. Morgan in contempt when she refused to make her daughter available for visitation with her father. Dr. Morgan repeatedly announced her intention to continue to defy the court until her daughter's eighteenth birthday, raising the question of how long civil contempt should continue when it is arguable that the coercive purpose of confinement has failed.

II. HISTORY

On April 26, 1989, Representative Frank R. Wolf introduced H.R. 2136, a bill to limit incarceration for civil contempt in the Superior Court of the District of Columbia, Family Division, to eighteen months.[1] Rep. Wolf introduced a modified version of his bill, H.R. 2296, on May 9, 1989. A hearing on both bills was held before the House Subcommittee on Judiciary and Education of the Committee on the District of Columbia on May 23. On June 20, 1989, an amendment in the nature of a substitute to H.R. 2136 was approved in the Subcommittee by voice vote, changing the limit to 12 months and expanding its scope to all civil cases in the courts of the District of Columbia. The bill, as amended, was favorably reported by the Subcommittee and by the full Committee the same day. H.R. 2136 passed the House of Representatives on June 27, 1989.

Meanwhile, in the Senate, on June 13, 1989, Senator Orrin Hatch introduced S. 1163, a bill to limit to 12 months the length of time an individual could be incarcerated for civil contempt in District of Columbia child custody cases. Both S. 1163 and H.R. 2136 were referred to the Senate Subcommittee on General Services, Federalism, and the District of Columbia of the Governmental Affairs Committee. The Subcommittee held a hearing on the bills on July 21, 1989, and also received written comments from several groups. Following the hearing, the Subcommittee and the full Committee agreed to report the bill favorably on July 21 and July 26, 1989, respectively.

A technical amendment was approved during the full Committee markup, clarifying that the bill applied only to civil, not criminal, contempt. Another amendment was offered during consideration of

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[1] Congress, rather than the D.C. City Council, has authority to legislate with respect to the courts of the District of Columbia.

the bill by the full Senate, adding an 18-month sunset provision and calling for reports on civil contempt by the Senate Governmental Affairs and Judiciary Committees.

The conference compromise set the cap on incarceration for civil contempt at 12 months, limited the bill to child custody cases in the courts of the District of Columbia, provided by expedited appeals (i.e., a hearing within 60 days of the request for an appeal), included special time limits for prosecuting a civil contemnor for criminal contempt, and retained the 18-month sunset provision and the committee report requirement.

III. THE LAW OF CIVIL CONTEMPT

There are two basic kinds of contempt recognized in law, civil and criminal. Under the doctrine of civil contempt, a judge may fine or imprison an individual for refusal to obey a court order, until he or she complies. Civil contempt has been deemed an "inherent" power of the court, enabling it to enforce its decrees and to protect the rights of parties to a case. *Michaelson* v. *United States,* 266 U.S. 42, 65–66 (1924); In re *Grand Jury Investigation (Braun),* 600 F.2d 420, 422 (3d Cir. 1979). In such instances, the court uses a fine or imprisonment for civil contempt to coerce the contemnor, and it is sometimes also called "remedial" contempt. *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 441–42 (1911). The length of incarceration depends on the civil contemnors themselves, who "carry the keys of their prison in their own pockets." In re *Nevitt,* 117 F. 448, 461 (8th Cir. 1902). Release is available whenever the contemnor complies with the court's order. For these reasons it has been established in case law that civil contemnors are not entitled to the full range of procedural protections afforded to criminal defendants. *Shillitani* v. *United States,* 384 U.S. 364, 370–71 (1966). Rather, due process in the civil contempt context requires only that an individual be provided notice and a hearing. Note, "Modern discussion of a Venerable Power: Civil Versus Criminal Contempt and Its Role in Child Support Enforcement: *Hicks* v. *Feiock,*" 22 Creighton L. Rev. 163, 171 (1988); Note, "The Coercive Function of Civil Contempt," 33 Chi. L. Rev. 120, 121–22 & n.7 (1965).

In contrast, criminal contempt is designed to punish past contumacious behavior, rather than to secure compliance prospectively. *Hicks* v. *Feiock,* 108 S. Ct. 1423, 1430 (1988). Parties accused of criminal contempt are, therefore, entitled to the usual due process protections of criminal defendants, including notice, jury trial (if incarceration of more than six months is possible), the opportunity to call and cross examine witnesses, the privilege against self-incrimination, the presumption of innocence, and proof beyond a reasonable doubt. Id., 108 S. Ct. at 1439 & n.5; Martineau, "Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt," 50 U. Cin. L. Rev. 667, 697 n.126 (1981); Fed. R. Crim. Pro. 42(b). Sentences and fines for criminal contempt are determinate, and the contemnor cannot secure early release from incarceration or relief from a fine by performing a court-ordered act. Permissible sanctions are limited by the constitutional prohibition of cruel and unusual punishment.

There has been a history of confusion over the distinction between civil and criminal contempt. See *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911); R. Goldfarb, *"The Contempt Power"* 49–67 (1963). The issue has been raised most often in the appellate courts when a contemnor challenges whether he or she has received appropriate procedural safeguards. The confusion is exacerbated by the fact that civil contempt may arise in a criminal proceeding and that criminal contempt may arise in a civil case. Moreover, civil and criminal contempt cannot be distinguished based on the nature of the underlying misconduct, because the acts which may give rise to the two kinds of contempt can be the same. Courts and commentators have identified various indicia to distinguish between civil and criminal contempt. These include:

(1) The court's purpose for imposing sanctions: if the court is seeking to coerce future compliance with a court order, the contempt is civil; if it is punishing past misconduct, the contempt is criminal.

(2) The procedural safeguards afforded: if an alleged contemnor receives the procedural safeguards of criminal law, it is criminal contempt; if the contemnor receives less procedural protection, it is civil contempt.

(3) The type of sanctions/ability to purge: civil contempt involves a conditional sentence of fine that terminates upon the compliance of the contemnor with a court order; criminal contempt involves an unconditional, fixed sentence or fine.

(4) The party whose interests are served: the court is vindicated in a criminal contempt proceeding when the contemnor is punished for flouting the court's authority; in a civil proceeding, private parties to the case whose interests are being harmed by the contemnor's refusal to obey the court's order are the primary beneficiaries.

(5) The intent of the contemnor: willfulness is an element of criminal contempt, but not of civil contempt.

See Kowalski, McCarty, S Stockmeyer, "Contempt of Court in Michigan," 4 Cooley L. Rev. 411, 417–420 (1987).

IV. CURRENT PRACTICE AND PROCEDURE FOR CIVIL CONTEMPT IN THE COURTS OF THE DISTRICT OF COLUMBIA

The Committee found that there is little information about the use of civil contempt in the courts of the District of Columbia. Although the Committee received the full cooperation of the District of Columbia judiciary and the Department of Corrections, much information that would be useful in evaluating civil contempt is not available in any readily retrievable form. However, the Committee was able to gather certain basic facts.

Citations for civil contempt arise primarily from two branches of the D.C. Superior Court—the Family Division and the Criminal Division. By far the most common use appears to be in Family Division. Most of these cases involve the failure of a parent or spouse to pay court-ordered support. The balance involve child custody and visitation rights, violations of civil protection orders, failure to take court-ordered blood tests, failure to comply with general orders in

domestic relations cases, and similar matters. (Chief Judge Ugast's letter to Senator Levin ("Ugast Letter"), Appendix.)

In the Criminal Division, civil contempt arises when individuals refuse to cooperate with a grand jury, by failing either to appear in response to a subpoena or to answer a particular question. Civil contempt may also be invoked in the Criminal Division when individuals refuse to testify or otherwise cooperate with a court order at trial. (Judge Weisberg's letter to Senator Levin ("Weisberg Letter"), Appendix.)

According to the D.C. Department of Corrections, there were a total of 823 incarcerations for civil contempt in the District of Columbia between 1985 and 1989, for an average of 165 cases per year. (Director Walker Ridley's letter to Senator Glenn, Appendix.) Data breaking these cases down by type of proceeding—e.g., Family Division, Criminal Division, or other—are not available. The average length of incarceration over this five-year period was 12.6 days. In the first 4 months of 1990, the D.C. Department of Corrections reported 26 cases of incarceration for civil contempt, which represents a lower rate of incarceration for civil contempt than in the preceding 5 years. The average length of time served from January through April 1990 remained fairly constant with the preceding 5 years, however, at about 12 days. (Id.)

This statistical information is consistent with the experiences reported to the Committee by the Chief Judge Fred B. Ugast on behalf of himself and other judges of the Superior Court. (Ugast Letter, Appendix.) A canvass of the judges and court staff with respect to the Family Division indicates "that it is rare for anyone to receive a sentence in excess of 60 days and quite common for contemnors to purge their violations and obtain release long before serving whatever sentence was imposed." In addition, "many who do not purge are given work release." Other than the case of Dr. Morgan, Judge Ugast said he has no knowledge of any "recent Family Division case where anyone has served more than 90 days for contempt."

While there is no statutory limit on incarceration for civil contempt in the Criminal Division, incarceration is limited to the duration of the grand jury or the trial because that is the period during which a contemnor could "purge" the contempt—that is, obey the court's outstanding order. In the District of Columbia, grand juries sit for 25 working days. Because they do not sit five days a week, their term may extend to a maximum of two and one half months.[2] Chief Judge Ugast, who supervises the 4 grand juries sitting at all times in the District of Columbia, reports that in the past 4 years he has never had occasion to cite anyone for civil contempt in connection with a grand jury matter. (Ugast Letter, Appendix.) He has, however, issued orders to show cause why individuals should not be held in contempt "with some regularity." (Id.) Judge Frederick H. Weisberg, Presiding Judge of the Criminal Division, similarly reports that civil contempt is "used sparingly" in that Division. (Weisberg Letter, Appendix.)

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[2] Although the rules permit the Chief Judge to extend the service of a grand jury, that rule has not been invoked since it went into effect in 1988. (Ugast Letter, Appendix.)

There is no statistical information available on the manner in which incarcerations are terminated, i.e., whether the contemnor purges the contempt, whether the court order forming the basis for contempt is rendered moot by outside circumstances (such as the expiration of the grand jury), or whether the court decides to release the contemnor for another reason.

Procedurally, civil contempt proceedings are typically commenced when a party files a motion to hold another party in contempt and the judge issues an order to show cause why that party should not be held in contempt. Chief Judge Ugast reports that 3,000 motions to hold parties in contempt were filed in the Family Division between January 1, 1988, and August 1990. (Ugast Letter, Appendix.) The alleged contemnor then has an opportunity to comply with the outstanding court order or to present evidence at a hearing as to why he or she should not be held in contempt. The 3,000 motions filed since January 1988 necessitated about 5,000 hearings in the Family Division. (Id.) Even if the judge presiding at the hearing holds the individual in contempt, it is a common practice to delay the imposition of any sanction in order to allow the contemnor to purge the violation before going to jail or paying a fine.

Appeals in cases of civil contempt, other than those now covered by the expedited appeal provision of the Act, are handled like ordinary civil matters. In Dr. Morgan's case, for example, she was incarcerated in August 1987. Her first post-incarceration appeal was not argued until eight months later, in April 1988, and the court did not render a decision until August 1988, when she had spent nearly a year in jail.

V. LIMITS ON CIVIL CONTEMPT

There are both statutory and common law limits on civil contempt, summarized below.

A. Statutory limits

A number of states and the federal government limit the maximum confinement for civil contempt in certain circumstances.

1. Federal

There is a federal statute limiting confinement for civil contempt which applies only to "recalcitrant witnesses." A recalcitrant witness can be imprisoned for the duration of a trial or a grand jury term, up to 18 months. (28 U.S.C. sec. 1826 (1989 Supp.).) This 20-year old statute essentialy codifies and elaborates on the Supreme Court's holding in *Shillitani* v. *United States*, 384 U.S. 364 (1966). Notwithstanding this law, some courts have held that a civil contemnor may be released even before the full 18 months have expired if the court finds that the coercive purpose is no longer being served. See the discussion in Section B, below.

2. State

The Committee has identified four states that have enacted laws circumscribing the court's power to confine individuals for civil

contempt, and another state that has enacted a more specialized limitation.

California limits confinement for civil contempt in all types of cases to one year. (Cal. Penal Code sec. 19.2 (1989).)[3] Wisconsin has two statutes limiting imprisonment for civil contempt. One statute limits confinement for "remedial" contempt to 6 months or the period of contempt, whichever is shorter. (Wisc. Stat. Ann. 785.04(1)(b).) The other Wisconsin statute limits civil contempt of recalcitrant witnesses in criminal proceedings to 1 year or the duration of the contempt. (Wisc. Stat. Ann. 972.08(2).) West Virginia and Pennsylvania limit civil contempt only in the sphere of domestic relations. West Virginia permits "indeterminate" confinement for civil contempt in cases of divorce, annulment, and separate maintenance, not to exceed 6 months or until the contemnor purges, whichever is shorter. (W.Va. Code Ann. sec. 48–2–22 (1989).) Pennsylvania also imposes a 6-month limit on incarceration for civil contempt in divorce cases for failure to comply with an order concerning property settlement or enforcing the payment of arrearages. (Pa. Stat. tit. 23 secs. 401(k)(6), 503 (1989).)

In addition, in New Jersey individuals may be held in civil contempt for refusal to answer questions or produce evidence before the State Athletic Control Board, which has jurisdiction over boxing and wrestling. Confinement for such contempt is limited to 18 months. (N.J. Stat. Ann. 5:2A–10.)

B. Common law limits

Because the purpose of civil contempt is to coerce the contemnor into obeying a court order, courts have recognized that incarceration should end when that purpose is no longer served. Thus, even before the enactment of the federal statutory limit for recalcitrant witnesses at the expiration of a grand jury's term because the court found that it was no longer possible for them to purge the contempt by testifying and complying with the court's order. *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966). Similarly, the inability to pay court-ordered child support is a defense to a charge of civil contempt for failure to comply with the order. See *Hicks* v. *Feicock*, 108 S. Ct. 1423, 1427 (1988). See also *Maggio* v. *Zeitz*, 333 U.S. 56, 76 (1948).

Some courts have expanded on this rule to order the release of civil contemnors even when compliance is theoretically feasible if they are convinced that there is no substantial likelihood in fact that the contemnor will comply with the court's order. "[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972). When the confinement will not achieve the purpose for which it was intended, courts have held that it crosses the line from coercion to punishment, and further confinement would constitute a violation of due process. See, e.g., *Soobzokov* v. *CBS, Inc.*, 642 F.2d 28, 30–31 (2d Cir. 1981); *Lambert* v. *Montana*, 545 F.2d 87 (9th Cir. 1976); *Catena*

[3] Although this provision appears in the "Penal" Code, it applies to civil contempt as well. California has adopted uniform procedures for civil and criminal contempt. *Hicks* v. *Feiock*, 108 S. Ct. 1423, 1429 n.4 (1988).

v. *Seidl*, 68 N.J. 224, 343 A.2d 744 (1975); in re Farr, 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (1974).

Moreover, this rule is invoked even when the federal statute sets forth an 18-month maximum for recalcitrant witnesses in order to shorten their period of confinement, although courts are deferential to Congress' judgment that 18 months is an appropriate term of confinement in most cases. Compare *Simkin* v. *United States*, 715 F.2d 34 (2d Cir. 1983) (remand for individualized determination of whether confinement for 10 months under sec. 1826 was still coercive); In *re Dohrn*, 560 F. Supp. 179 (S.D.N.Y. 1983) (witness held pursuant to sec. 1826 ordered released after 7 months); and in *re Cueto*, 443 F. Supp. 857 (S.D.N.Y. 1978) (witnesses held more than 10 months under sec. 1826 ordered released) with In re *Grand Jury Investigation (Braun)*, 600 F.2d 420 (3d Cir. 1979) (court declines to substitute its judgment for Congress as to when confinement crosses the line from coercive to punitive).

The District of Columbia has not clearly accepted this "uncoerceable contemnor" limitation on civil contempt. See *Morgan* v. *Foretich*, 546 A.2d 407, 414 (D.C. 1988) (uncoerceable contemnor defense must first be presented to the trial court); S. Hrg. 100–254, Subcommittee on General Services, Federalism, and the District of Columbia of the Committee on Governmental Affairs, "Revising the District of Columbia's Civil Contempt Statute," July 21, 1989, p. 20 (testimony of Judge Peter J. Messitte). The Court of Appeals for the District of Columbia has stated that "justification [for noncompliance] is established only upon a showing of inability to perform or substantial performance" by the contemnor. *Morgan* v. *Foretich*, 528 A.2d 425, 428 (D.C. 1987). See also *D.D.* v. *M.T.*, 550, A.2d 37, 44 (D.C. 1988). Although this issue was eventually presented to the Court of Appeals in the Morgan case, there was no final ruling on this point.[4]

VI. THE COMMITTEE'S RECOMMENDATIONS

1. The Committee recommends that Congress extend the Act

The Committee has found no evidence that there is an on-going problem with incarceration for civil contempt generally in the District of Columbia. There is no evidence that judges are abusing their power to confine contemnors, and the average sentence served by civil contemnors who are confined is only 12 days. Thus, there appears to be no justification for expanding the Act's coverage.

Nonetheless, there is the potential for a case in which civil contempt results in a significant deprivation of liberty, without the full range of procedural safeguards that apply in criminal cases, and in which it is questionable that confinement will achieve its coercive purpose. It appears that this risk may be greatest in child custody cases, if a parent believes he or she is protecting the child. The Committee therefore recommends that the Act be extended, with consideration given to the modifications described below.

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[4] The Court of Appeals' fourth panel opinion in the Morgan case, 564 A.2d 1 (1989), which recognized the "uncoerceable contemnor" limitation, was vacated so that the court could reconsider the case en banc. The court's en banc opinion was never issued in light of the intervening legislation, which resulted in Dr. Morgan's release.

For example, by its nature, child sexual abuse is difficult to prove in court. Typically, the child is the only witness to the crime. Young victims may be inarticulate, unsophisticated, and frightened, and the testimony of children is often considered suspect. S. Apel, "Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt," 38 A.U. L. Rev. 491, 494–501 (1989). Thus, a custodial parent who suspects an ex-spouse of abusing their child may be unable to prove that to a court's satisfaction by a preponderance of the evidence. Yet, it would not be irrational for a parent to want to protect a child from even a much smaller risk of abuse. The Committee is aware of reports of several such cases, in addition to the Morgan case, around the country.[5] In such circumstances, if the custodial parent is not coerced into making the child available after a 12-month incarceration, it is reasonable to assume that further incarceration would also be futile.

Moreover, the Act's 12-month cap on incarceration for civil contempt in child custody cases is in keeping with the thrust of modern family law, which places primary emphasis on the best interests of the child rather than on the rights of the parents. No child is well-served by being kept in hiding from one parent while the other remains in jail indefinitely. While limiting incarceration to 12 months will not automatically reunite a child with his or her parents upon release, at least it terminates the stalemate. The Committee believes that it strikes an appropriate balance between the court's need to vindicate its authority and the best interests of the child.

The Committee recognizes that creating a fixed statutory maximum on the length of confinement for civil contempt changes its coercive effect. First, a contemnor knows from the outset what the maximum confinement will be and can make a calculated decision whether the disobedience is worth the loss of liberty. In addition, the coercive effect diminishes over time. Thus, a contemnor who has endured 10 or 11 months in jail is unlikely to give up when the maximum is set at 12 months. While the Committee does not believe that this phenomenon warrants allowing the Act to expire, for the reasons stated above, it does believe that, absent any evidence of abuse, it militates against enacting a statutory cap on civil contempt outside the sphere of child custody cases.

The Committee believes that an expedited appeal, as provided by the Act, is appropriate when an individual has been jailed for civil contempt, to minimize the likelihood that he or she will be incarcerated pursuant to an invalid order or faulty procedures. Finally, the Act's provisions for converting incarceration for civil contempt to criminal contempt should be continued in order to provide the court an option other than release when faced with continuing disobedience.

2. The Committee recommends that Congress consider mandating additional "due process" protections in all civil contempt cases

The Committee believes that the power of courts to invoke civil contempt in order to secure compliance with court orders is impor-

[5] See Apel, supra, at 503–504 n.53.

tant to the rule of law. Nonetheless, the Committee recognizes that an individual's loss of liberty—whether designed to coerce or to punish—is an extremely serious matter. The Committee believes that any legislative limit on the power of civil contempt should be designed to terminate unjust incarcerations. The Act, as currently drafted, may not adequately meet that objective because of the unavailability to alleged contemnors of certain additional due process protections. Without them, the Act might only limit unjust incarcerations to 12 months; it will not necessarily help set an unjustly incarcerated person free before the expiration of 12 months. As one commentator wrote, "it is not much solace to a person wrongly held in jail to know that his or her confinement will only last a year." Accordingly, the Committee recommends that Congress consider mandating the following safeguards in civil contempt cases in District of Columbia courts and federal courts in order to enhance the quality of decision-making:

expedited appeals for individuals held in civil contempt in all types of cases (not just child custody cases);

plenary review on appeal of civil contempt cases;

appointed counsel for indigents at civil contempt hearings; and

periodic review of sanctions for civil contempt by the court that imposed them to ensure that they are still appropriate..

Prompt and meaningful review by an appellate court would help ensure that no one is incarcerated for civil contempt for failing to obey an invalid court order or without appropriate procedural safeguards. Expedited appeal provisions are currently included in the Act, which governs child custody cases in D.C., and in the federal statute governing recalcitrant witnesses, 28 U.S.C. sec. 1826(b). Before this provision was added to D.C. law, for example, Dr. Morgan spent eleven and one half months in jail before the Court of Appeals rendered its decision on her appeal. Upon further reflection, the Committee believes that the appeals process should be expedited further. As currently drafted, the Act requires that the appellate court hear a contemnor's appeal within 60 days, but there is no requirement that the court render its decision promptly. For example, the court of appeals did not render its decision in the Morgan case for over 3 months after hearing oral argument. In contrast to the Act, the federal statute governing recalcitrant witnesses requires that the appellate court "dispose of" any appeal from an order of incarceration within 30 days. The Committee believes that Congress should consider following the model of the Federal statute by mandating that appeals in cases of incarceration for civil contempt be heard and decided within 60 days, so that an unjustly imprisoned person can be freed promptly.

Moreover, expediting the appellate process may have a positive effect even in cases where the contempt finding is upheld on appeal. Such a prompt appellate ruling may enhance the desired coercive effect of incarceration because an imprisoned contemnor will know that he or she cannot gain freedom through an alternative to compliance—having the contempt finding overturned on appeal. Thus, the contemnor's only options will be compliance or continued confinement.

Congress should also consider whether the standard of review of appeal should be less deferential that "abuse of discretion," the standard now commonly employed. At present, an appellate court may reverse a trial court's order of incarceration for civil contempt only if it is clearly wrong. Given the liberty interests at state, the Committee recommends that Congress consider having appellate courts conduct a meaningful, exacting review in order to identify errors or injustice that might otherwise go undetected. The D.C. Bar Section on Courts, Lawyers and the Administration of Justice and the American Civil Liberties Union have expressed support for expedited appellate review and a less deferential standard of review. (See Appendix.)

Although there is no legal requirement that indigent parties be represented by counsel appointed at government expense in civil matters, the Committee believes that incarceration is a serious sanction and that appointed counsel might be appropriate for the contempt hearing, though not for the underlying matter. See Note, "Coercive Contempt and the Federal Grand Jury, 79 Colum. L. Rev. 735, 762 (1979). Again, both the District of Columbia Bar Section on Courts, lawyers, and the Administration of Justice and the ACLU have expressed support for appointed counsel in these circumstances. (See Appendix.)

Finally, Congress should consider whether to mandate periodic review of any sanctions imposed for civil contempt, in order to ensure that they are still serving a coercive purpose.

APPENDIX

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA,
Washington, DC, August 9, 1990.

Senator CARL LEVIN,
Chairman, Subcommittee on Oversight of Government Management, U.S. Senate, Committee on Governmental Affairs, Washington, DC.

DEAR SENATOR LEVIN: On July 17, 1990, you wrote asking for my comments about extension of the Civil Contempt Imprisonment Limitation Act of 1989. At my suggestion, you also wrote to Judge Schwelb of the D.C. Court of Appeals and to Judges Mencher, Burgess, Weisberg, and Webber of this Court, asking for their views. You should already have Judge Weisberg's response. I have consulted with the other judges to whom you wrote and have consolidated the information they gave me in this letter.

The legislation was obviously prompted by the widely publicized case of Dr. Elizabeth Morgan. Our view here is that the Morgan case was an aberration, posing a problem that review of our Court records suggests has not happened before and is unlikely to recur. Discussions with judges in the Civil Division persuade me that use of the contempt power to coerce compliance in civil cases is rare. We know of no case here where anyone has been incarcerated for any length of time remotely approaching the limit in the statute.

Judge Weisberg has already commented on the use of civil contempt powers in the Criminal Division. His experience is consistent with mine. As Chief Judge, I supervise the Grand Juries; we have four sitting at all times. In four years, I have never had occasion to cite anyone for civil contempt in connection with a Grand Jury matter, although I have with some regularity issued orders to show cause why individuals should not be held in contempt for failure either to appear in response to a subpoena or to answer a particular question. I should point out that District of Columbia Grand Juries sit for only twenty-five working days. Their service may extend to a maximum of two and-a-half months in those instances where they are called upon to sit for three or fewer days in a week. Although the rules so permit, I have yet to be asked to extend the service of a Grand Jury since the new system was established in 1988. As you know, the coercive power of a contempt citation would expire at the conclusion of a Grand Jury's service.

It is in the Family Division that contempt is used regularly to enforce compliance with Court orders. In response to your request, we reprogrammed our computer to retrieve information that we thought would be relevant. Since January 1, 1988, some 3,000 motions to hold persons in contempt of court or orders to show cause

why persons should not be held in contempt were filed in the Family Division. These motions necessitated about 5,000 hearings. The vast majority dealt with the failure of persons to pay court-ordered support. The balance involved child custody and visitation, violation of civil protection orders, failure to take court-ordered blood tests, failure to comply with general orders in domestic relations cases, and the like. Unfortunately, our computer programs are not designed to capture detailed data on the outcomes in these cases. However, a canvass of judges and court staff persuades us that it is rare for anyone to receive a sentence in excess of 60 days and quite common for contemnors to purge their violations and obtain release long before serving whatever sentence was imposed. Many who do not purge are given work release. Other than the Morgan case, we know of no recent Family Division case where anyone has served more than 90 days for contempt.

In sum, our review of civil contempt in D.C. Superior Court clearly suggests that there is no problem and, thus, no need for a solution in the form of the Civil Contempt Imprisonment Limitation Act. The question is raised again, as it was in 1989 when the statute was enacted, whether it is appropriate for one aberrational case to drive the entire process.

I do agree with Judge Weisberg that the issue comes down to the policy judgment he posed: should judges have the authority to decide when the coercive sanction has outlived its utility in a particular case, or should there be a statutorily defined time limit? A time limit presents a couple of obvious problems: (1) a contemnor can choose to "wait it out," the incentive to comply with the Court's order declining as the deadline approaches; and (2) once the time has run, the Court is thenceforth powerless to secure compliance with its original order. The potential threat of a time limit to the rule of law is apparent, given that the civil contempt power is the only instrument available to the Court to enforce its orders. Moreover, it should not be forgotten that a contemnor can always seek appellate redress of a trial court's abuse of the contempt power.

I hope the information we have provided and some of the thoughts I have added will be useful as you consider this important subject. Please don't hesitate to call me for any additional information you may need.

Sincerely yours,

FRED B. UGAST, *Chief Judge.*

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA,
Washington, DC, July 19, 1990.

Senator CARL LEVIN,
Chairman, Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, U.S. Senate, Washington, DC.

DEAR SENATOR LEVIN: I am writing in response to your letter of July 17, 1990 regarding the use of civil contempt in the District of Columbia Courts, which you are studying in connection with your review of the District of Columbia Civil Contempt Imprisonment

Act of 1989. Unfortunately, your letter reached me just before I am scheduled to leave on vacation, and a detailed response will not be possible.

Much of my experience has been in the Criminal Division of the Court, and I am now the Presiding Judge of that Division. In my experience, the civil contempt power to incarcerate has been used sparingly in the Criminal Division. When it has been used, the period of incarceration has rarely exceeded the duration of a particular trial or the life of a grand jury. At the present time, our grand juries sit for twenty-five working days, and while they do not all sit five days a week, their terms, with few exceptions, generally expire within three months or less. Personally, in my thirteen years on the Superior Court, in all of its Divisions, I have not had occasion to incarcerate anyone for civil contempt for any period even approaching the one year allowed by the Act.

In my opinion, the Morgan case, which precipitated the 1989 Act, was truly abberational and is not likely to be repeated. For that reason, I did not believe the Act, as a general limitation on the civil contempt power of our judges in child custody cases, was necessary or desirable at the time of its enactment, and I do not believe that its expiration would, as a practical matter, be harmful to the public interest or to the rights of any individuals who might come before our Court. Nor, for the same reason, do I perceive any need to extend the Act to proceedings other than child custody cases.

On the other hand, one could reasonably argue that the Act is an appropriate limit on the court's civil contempt power, that it will be irrelevant in virtually every case, in that the purposes of the contempt order will be served long before the statutory cap, but that it will remain as an outside limit for that rare case, if one ever recurs, in which the incarceration for contempt does not coerce the court-ordered conduct even after many months. The issue, of course, comes down to a policy judgment: does the Congress want the judges to have the authority to decide, in the exercise of discretion in the context of a particular case, when the coercive sanction has outlasted its utility, or does it want to circumscribe that authority by placing an outside limit on the use of the inherent judicial power to compel certain behavior that may be required to do justice in a particular case?

I hope that these comments are useful to your Committee, and I am sorry that my current schedule will not permit a more penetrating analysis. If I can be of further assistance, please feel free to contact me after my return from vacation in August.

Sincerely,

FREDERICK H. WEISBERG.

GOVERNMENT OF THE DISTRICT OF COLUMBIA,
DEPARTMENT OF CORRECTIONS,
Washington, DC, May 7, 1990.

Hon. JOHN GLENN,
Chairman.
Hon. WILLIAM V. ROTH, Jr.,
Ranking Minority Member,
U.S. Senate, Committee on Governmental Affairs, Washington, DC.

DEAR SENATORS GLENN AND ROTH: This correspondence responds to your letter of April 2, 1990, requesting data on incarcerations for civil contempt in the D.C. correctional system for the last five years.

Research by staff of the D.C. Department of Corrections has revealed 823 such cases, as follows:

	1985	1986	1987	1988	1989
Number of cases	159	186	221	105	152
Average time served (days)	12	10	10	9	22

In calendar year 1990, the D.C. Department of Corrections has had 26 such cases, with an average time served of 12 days.

Each person committed to this department for civil contempt is entered into the automated database under one broad category. We are unable to identify specific types of civil contempt (e.g., for child custody, etc.), unless the civil contempt charge is accompanied by a criminal charge. We are also unable to identify the manner in which the incarceration is terminated.

This agency also contacted the D.C. Superior Court to ascertain whether an automated listing of civil contempt cases by type is available there, but we did not receive a favorable response.

Should you require additional information, please contact me on 673-7316, or have a member of your staff contact Michael L. Chambers, Program Analysis Officer, at 673-3662.

Sincerely,

WALTER B. RIDLEY, *Director.*

COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE
SECTION, THE DISTRICT OF COLUMBIA BAR,
Washington, DC, July 26, 1989.

Hon. JIM SASSER,
U.S. Senate, Senate Rayburn Office Building,
Washington, DC.

DEAR SENATOR SASSER: Enclosed for inclusion in the record of the hearings held Friday, July 21, 1989, before The Subcommittee on General Services, Federalism, and the District of Columbia of the Senate Committee on Governmental Affairs, are the comments of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar. The comments focus on the legislation passed by the House of Representatives, H.R. 2136.

Sincerely yours,

ROBERT N. WEINER.

Enclosure.

STATEMENT OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR ON H.R. 2136 THE DISTRICT OF COLUMBIA CIVIL CONTEMPT IMPRISONMENT LIMITATION ACT OF 1989

(*Robert N. Weiner, Co-Chair; Randell Hunt Norton, Co-Chair; Carol Elder Bruce; Richard B. Hoffman; Jeffrey F. Liss; David A. Reiser; Arthur B. Spitzer; Steering Committee of the Section on Courts, Lawyers, and the Administration of Justice)

STANDARD DISCLAIMER

"The views expressed herein represent only those of the Section on Courts, Lawyers, and the Administration of Justice of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors."

SUMMARY

The House of Representatives has passed, and the Senate is considering, H.R. 2136, the "District of Columbia Civil Contempt Imprisonment Limitation Act of 1989," which would amend the D.C. Code to impose a 12-month limit on the time for which a person could be imprisoned for civil contempt by the D.C. courts. The Section on Courts, Lawyers, and the Administration of Justice of the D.C. Bar opposes this legislation. The Section believes that the Bill would weaken the ability of Courts to secure compliance with their orders, but would not prevent unjust year-long incarcerations. A more effective course, in the Section's view, would be to adopt procedural safeguards such as a guarantee of legal counsel in civil contempt cases, provide for expedited appellate review, and specify that such review should be plenary rather than deferential.

A dissenting statement by one of the members of the Section's Steering Committee takes the position that an individual should not be confined for more than 18 months without a trial by jury.

STATEMENT OF THE SECTION ON COURTS, LAWYERS, AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR ON H.R. 2136 THE DISTRICT OF COLUMBIA CIVIL CONTEMPT IMPRISONMENT LIMITATION ACT OF 1989

The Section on Courts Lawyers, and the Administration of Justice of the District of Columbia Bar opposes the enactment of H.R. 2136, which would amend the D.C. Code to impose a 12-month limit on the time for which a person could be incarcerated for civil contempt by the District of Columbia courts.

This bill has been prompted by a concern—arising out of a particular case now before the District of Columbia courts—that under existing law, individuals may be unjustly incarcerated for very lengthy periods of time based on the incorrect (and perhaps improperly motivated) decision of a single trial judge. The Section ex-

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*Dissents in a separate statement.

presses no view on that particular case. [1] We are also unaware of any evidence that there is a general problem of abuse by courts of the civil contempt power, requiring legislative intervention. As Justice Black, joined by Chief Justice Warren and Justice Douglas, have noted, "[s]uch coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive has quite properly been exercised for centuries to secure compliance with judicial decrees." *Green* v. *United States,* 356 U.S. 165, 197 (1958) (opinion dissenting as to other issues). However, even if the concern underlying this bill is valid, we believe H.R. 2136 addresses it in a manner that is counterproductive.

All that H.R. 2136 would accomplish, if it were enacted into law, would be to limit an unjust incarceration to 12 months. It is not much solace to a person wrongly held in jail to know that his or her confinement will only last a year.

On the other hand, it is not at all clear to us that a person who is properly being held in jail for civil contempt ought to go free after twelve months, or any other pre-ordained period of time, in all cases. The purpose of incarceration as a sanction for civil contempt is to coerce compliance with a court order; there is not necessarily a one-year time limit on the importance of obtaining such compliance. Moreover, the existence of a pre-established limit on incarceration will assure that this sanction will be less and less effective with each passing day, as the contemnor knows that he or she faces a shorter and shorter period of imprisonment.

Thus, H.R. 2136 would do nothing to prevent unjust year-long incarcerations, and simultaneously would reduce the effectiveness of this essential tool for obtaining compliance with court orders. In our view, this is exactly backwards. The proper goal of any legislation in this area, it seems to us, should be to prevent any unjust incarceration, to the extent possible, without detracting from the court's ability to enforce their lawful orders.

This can be accomplished through legislation providing for appropriate procedural safeguards in civil contempt cases. First, at the trial levels, there should be a guarantee of legal counsel to anyone facing incarceration for civil contempt. Defendants in criminal cases—including cases of criminal contempt—are already provided with court-appointed attorneys if they cannot afford to retain private counsel. We think the same rule should apply here. A person should not be deprived of liberty as the result of complex

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[1] Because that case involves the custody of a juvenile, most of the records of the case are sealed, and most of the proceedings have been closed to the public. It is, accordingly, impossible for those not directly involved in the case to form an educated opinion about its merits.

Interestingly, another case involving the lengthy incarceration of a mother for civil contempt of court amidst allegations of child abuse is now before the courts. However, in that case, the mother is the person accused of the child abuse. *See* "High Court to Weigh Rights of Md. Mother, Missing Child," The Washington Post, July 10, 1989, at A-1 (reporting the case of Ms. Jacqueline Bouknight, who has been in the Baltimore City Jail since April, 1988 for refusing to obey a court order to disclose the whereabouts of her son, whom she is suspected of having abused or killed). The Maryland Court of Appeals ordered Ms. Bouknight to be released on the grounds that the order compelling her to disclose the whereabouts of her son violated her right against self-incrimination under the Fifth Amendment, see in re: *Maurice,* 314 Md. 391, 550 A.2d 1135 (1988), but the United States Supreme Court stayed her release pending review of that decision. See *Baltimore City Dep't of Social Services* v. *Bouknight;* 109 S. Ct. 571 (1988) (Rehnquist, Circuit Justice, granting stay); 109 S. Ct. 1636 (1989) (granting certiorari). Had H.R. 2136 been applicable to Ms. Bouknight's case, she would have been released from jail three months ago, with the whereabouts and condition of her son still unknown.

legal proceedings without having the assistance of counsel if he or she wants it.

Second, and most relevant to the concerns that prompted the introduction of H.R. 2136, Congress should provide for the prompt and effective appellate review of a trial judge's decision to incarcerate a person in order to compel compliance with a court order. Such review should be very expedited (perhaps to the same degree as a petition for a writ of habeas corpus), and the standard of review should be plenary rather than deferential. Additionally, there should be a specific provision for periodic review, by both the trial and appellate courts, of the continued appropriateness of incarceration. These measures will assure that any unjustified imprisonment is promptly terminated.[2] At the same time, if the trial court's order is found to be valid and the incarceration is upheld on appeal, the sanction will retain its effectiveness as a means of coercing compliance, since the contemnor will know that he or she faces indefinite incarceration.

Of course, even without any change in law, a person cannot be imprisoned forever for civil contempt. The law already recognizes that "once it appears that the commitment has lost its coercive power, the legal justification for it ends and further confinement cannot be tolerated." *Catena* v. *Seidl,* 65 N.J. 257, 321 A.2d 225, 228 (1974); see also *Morgan* v. *Foertich,* No. 88-1599 (D.C. App. May 26, 1989) (remanding case to trial court for renewed factual determination on this issue). In some cases, that point may be reached in less than a year, in other cases, it may not yet have been reached after a year. "No hard and fast rule can be formulated and no fixed period of time can be set," *Catena* v. *Seidl,* supra, 321 A.2d at 228; rather, "each case must be declared on an independent evaluation of all of the particular facts. Age, state of health and length of confinement are all factors to be weighed, but the critical question is whether or not further confinement will serve any coercive purpose." *Catena* v. *Seidl,* 68 N.J. 224, 343 A.2d 744, 747 (1975),[3] In our view, this is the correct approach to these questions.

The alternative approach reflected in H.R. 2136—which would permit a person who is incarcerated for civil contempt to be also prosecuted for criminal contempt, and, if convicted by a jury, to be sentenced to imprisonment for an additional term—is not a satisfactory one, because criminal contempt sanctions do not serve the same purposes as civil contempts sanctions, and criminal contempt procedures do not make sense in the civil contempt context.

In the first place, a criminal sentence will not terminate upon compliance with the underlying court order; accordingly, the contemnor will no longer have any incentive to obey it. Secondly,

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[2] This is not the existing situation. For example, Dr. Morgan was incarcerated at the D.C. Jail for 11½ months before the D.C. Court of Appeals issued its ruling on her appeal of the civil contempt order. See *Morgan* v. *Foertich,* 546 A.2d 407 (D.C. 1988).

[3] As the New Jersey Supreme Court has also pointed out, a person's refusal to comply with a court order during an initial period of incarceration may result from "the hope or advice that it would not be necessary for him to break his silence, because he had good legal grounds for securing his release." *Catena* v. *Seidl,* supra, 321 A.2d at 229. This may well have been the situation during the first 11½ months of Dr. Morgan's confinement, while her initial appeal was pending. See note 2, supra. The existence of such situations highlights the reason why providing for an expedited appeal is the most constructive manner of addressing the problem of incarceration for civil contempt.

many contemnors may feel confident that they will not be convicted by a unanimous jury because their behavior, no matter how blatantly contemptuous, is popular with some segment of the community. Imagine, for example, prosecuting a right-to-life demonstrator who refuse to obey a court order to stop blocking the entry to an abortion clinic, or a labor leader who refuses to obey a court order to call off an illegal strike. In many communities, conviction would be impossible. It is the proper role of a jury to determine whether a person has been proven guilty beyond a reasonable doubt. It is not the proper role of a jury to determine whether a court order is valid and should be obeyed.[4] That is the job of the appellate courts, which is why we believe H.R. 2136 is off the mark.

DISSENTING STATEMENT

H.R. 2136 properly limits the time that a judge may confine an individual for civil contempt. It does not eviscerate the contempt sanction. It merely acknowledges the right of trial by jury for persons who are incarcerated for more than a year.

Plainly, a court does and should have the prerogative to coerce compliance with its orders without invoking the full panoply of rights guaranteed to a criminal defendant. But that authority must be limited. To allow a judge to imprison an individual indefinitely with no trial by jury places too much power in the hands of a single person. As the Supreme Court stated in *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968),

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against . . . the compliant, biased, or eccentric judge. If the defendant preferred the commonsense judgment of the jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.

Under H.R. 2136, a court cannot confine a person for more than 12 months without initiating criminal contempt proceedings and allowing a trial by jury. In my view, this is by and large a reasonable check on the court's power, although I think that setting the boundary at 18 months strikes a better balance between the needs of the judicial system and the rights of the individual. Indeed, the federal recalcitrant witness statute, 28 U.S.C. § 1826(a), has long limited to 18 months the time a witness may be incarcerated for defying an order to testify before a grand jury. Enforcement of the criminal law apparently has not suffered.

That civil contempt is coercive—that an individual can theoretically terminate the sanction by complying with the court's order—does not vitiate the need for such a limit. The court's order may not be reasonable or proper, or it may be impossible to comply.

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[4] As Justices Black and Douglas observed in *United States* v. *United Mine Workers of America*, 330 U.S. 258 (1947) (opinion concurring in relevant part): "In the case of [civil] contempt. . . [i]f the court limits itself to its proper action in such cases, namely, process of imprisonment merely to prevent the violation of he decree, and if the imprisonment is to cease as soon as the danger of disobedience has ceased, the jury, which is thought necessary to pass upon the desert of a defendant to suffer punishment(,) is not required. . . . So far, therefore, as popular clamor demands a jury trial in such cases, it seems to go beyond the requirements of justice." Id at 332 (quoting Beale, Contempt of Court, 21 Harv. L. Rev. 161, 173–74 (1908)).

Moreover, the determination when a sanction ceases being coercive and becomes punitive is a subjective and fact-bound issue, to be decided by the very judge whose authority is being resisted. Under these circumstances, a prophylactic rule drawing the line between coercion and punishment at 18 months is appropriate. It would eradicate potentially the most serious abuses of civil contempt for punitive ends without appreciably diminishing the court's power to secure compliance with its orders. The prospect of incarceration for a year and a half on a civil contempt citation, followed by possible indictment, conviction, and imprisonment for criminal contempt should deter defiance of court orders.[1]

The contention in the majority statement that any abuses by trial judges can be remedied by appellate courts proves too much. On the same logic, jury trials in criminal cases would serve no function—the appellate courts could simply correct any erroneous decisions by the trial courts. Although the appellate process does afford substantial protections, it is no substitute for trial by jury.

Finally, the majority suggests that a court should be entitled to confine an individual indefinitely without a jury trial because juries might otherwise nullify court orders. However, as noted above, an essential function of the jury is to "safeguard against * * * the compliant, biased, or eccentric judge." *Duncan* v. *Louisiana,* 391 U.S. at 156. The majority turns that safeguard on its head. I have great faith in the wisdom of our judiciary, but now so much that I would insulate from review by a jury of one's peers a decision to jail an individual for more than a year and a half.

With the modification noted, I would endorse H.R. 2136.

ROBERT N. WEINER.

AMERICAN CIVIL LIBERTIES UNION
OF THE NATIONAL CAPITAL AREA,
Washington, DC, July 18, 1989.

Re: H.R. 2136.

Hon. JAMES R. SASSER,
Subcommittee on General Services, Federalism and the District of Columbia, Committee on Governmental Affairs, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN SASSER: As you know, H.R. 2136, which would amend the D.C. Code to impose a 12-month limit on the time for which a person could be incarcerated for civil contempt by the District of Columbia courts, was recently passed by the House of Representatives and has been referred to your Subcommittee for consideration.

The American Civil Liberties Union of the National Capital Area opposes this bill. We would like to acquaint you with our reasons—and our alternative suggestions—at this time. We have enclosed a statement outlining our views.

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[1] While criminal contempt is a punitive sanction, one avowed purpose of such sanctions is to deter violation of criminal laws. Congress could compensate for any feared diminution in the potency of civil contempt by increasing the penalties for criminal contempt.

For the reasons explained in that statement, we hope that the Subcommittee on General Services, Federalism and District of Columbia will *not* act favorably on H.R. 2136, but will instead report out a bill providing for expedited, non-deferential appeals in cases where incarceration is imposed as a sanction for civil contempt of court, and providing for the appointment of counsel for indigent litigants facing such sanctions. If it would assist the Subcommittee's staff for us to provide a draft of such an alternative bill, we should be happy to do so.

We hope that the Subcommittee will not report this bill to the floor without holding hearings; we would of course, be eager to testify at any such hearing.

Very truly yours,

MARY JANE DEFRANK,
Executive Director.

ARTHUR SPITZER,
Legal Director.

STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA ON H.R. 2136 THE DISTRICT OF COLUMBIA CIVIL CONTEMPT IMPRISONMENT LIMITATION ACT OF 1989

As adopted by the House of Representatives, H.R. 2136, the "District of Columbia Civil Contempt Imprisonment Limitation Act of 1989," would amend the D.C. Code to impose a 12-month limit on the time for which a person could be incarcerated for civil contempt by the District of Columbia courts. The American Civil Liberties Union of the National Capital Area opposes this bill, and suggests that there are better ways to address any perceived problems in this area.

In considering this issue, it is essential to keep in mind that the purpose of incarceration for civil contempt is not to punish a person for having disobeyed a court order, but to coerce him or her into obeying it. Announcing in advance an absolute time limit for that coercion sends to the contemnor the message that obedience to the court's order is not really required, but is simply an option to be balanced against the alternative option of one year of incarceration.

Thus, after six months of confinement a contemnor will not have to ask himself whether he would rather endure a further indefinite period of incarceration than comply with the court's order, but can say to himself that his sentence is already half over. After nine months, he will know that he only has to hold out for another three. After 10 or 11 months, it is hard to imagine that the sanction will retain much coercive force at all. Therefore, if a 12-month limit (or any other limit) is established in advance, incarceration will become a less and less effective sanction with each passing day, as the contemnor knows that his release is one day closer. The establishment of such a limit, therefore, is an effective way of signalling to litigants that society doesn't really think that it is essential to require obedience to court orders.

We strongly disagree with that proposition. Under our constitutional system, obedience to court orders is the essential step in assuring that ours is "a government of laws not men" (or women).

Individuals and institutions may disagree as to their legal rights and obligations, and even as to the meaning of the Constitution, but once the courts have ruled in a particular case, it is central to our form of government that their orders be tested by appeal rather than by defiance. That is why President Eisenhower sent the Army into Litle Rock to enforce a court's school desegregation order, and why President Nixon probably would have been impeached had he disobeyed a court's order to turn over the White House Tapes to the Special Prosecutor. We do not think that there is a 12-month limit on the need to obtain compliance with such orders.

No doubt an incarcerated individual suffers just as much whether his imprisonment is called "punishment" or "coercion," but there is a crucial fact that distinguishes a civil contemnor from other incarcerated persons: he "carries the keys of his prison in his own pocket"—that is, he can end the imprisonment at any time simply by obeying the court's order. Thus, if the court's order is valid, the prisoner has no one but himself to blame for his confinement.

Moreover, the law already recognizes that if a particular individual cannot be coerced into compliance with a court order by continued confinement, then the only legitimate purpose of the confinement is not being served and the confinement should end. The courts consider these circumstances on a case-by-case basis, and we think that is the appropriate way in which they should be considered. There may be cases in which it is quite clear after even less than 12 months that continued imprisonment will be of no avail; there may be other cases in which, after 12 months, it appears that a contemnor's resolve to disobey a court order is finally beginning to weaken. In our view, such a case-by-case determination is the sensible way for this standard to be applied.[1]

Some witnesses at the House committee hearing suggested that rather than facing indefinite confinement, a person who does not obey a court order after a term of incarceration should be prosecuted for criminal contempt and, if convicted, imprisoned for a specified term. The House adopted that suggestion in the amended version of H.R. 2136 that it adopted. In our view, however, that is not a satisfactory alternative. In the first place, the punishment for criminal contempt will not have the effect of compelling compliance with the court order, for any future compliance will not terminate the punishment. Thus, there will be no incentive to comply. Secondly, the bill provides that any prosecution for criminal contempt is subject to a jury trial,[2] which means that the contemnor may feel confident that he will not, in fact, be punished where the court's order is not a popular one in the community. Imagine, for example, how pointless it would have been to prosecute before a jury a charge of contempt against a Southern Governor who dis-

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[1] Thus, at this very time, the D.C. courts are conducting an inquiry into whether continued incarceration of Dr. Elizabeth Morgan can be justified under this standard. See "Jailed Doctor, Ex-Mate Talk With Mediators," The Washington Post, June 9, 1989, at B-3; "Elizabeth Morgan's Brother Joins Her in Defying Court," The Washington Post, June 10, 1989, at A-1.

[2] The Constitution also requires that a jury trial be available in criminal contempt cases where the punishment imposed is greater than six months' confinement. See *Codispoti* v. *Pennsylvania*, 418 U.S. 506 (1974).

obeyed a court order to desegregate the public schools in 1956, or a member of the Yonkers, N.Y., City Council who disobeyed a court order to build public housing in an upper-middle-class neighborhood in 1988. Indeed, it is precisely in those cases where the court order at issue is essential to protect minority rights or the rights of unpopular individuals or groups that the use of a jury trial may vitiate the court's ability to compel obedience to its order.

Of course, not all court orders are valid, and it would be most unfortunate to imprison a person for disobeying an invalid order. Similarly, no one should be incarcerated simply because of the personal animosity or unreasonable obstinacy of a single trial judge. However, imposing a 12-month cap on incarceration for contempt does not address the possibilities of an invalid court order or a wayward judge in a well-targeted way, since even a short period of unjustified incarceration is a terrible thing, while even 12 months of justifiable incarceration is not necessarily excessive. Thus, H.R. 2136 provides no mechanism for distinguishing between valid and invalid court orders, and would do nothing at all to prevent a person from having to spend 12 months in jail for disobedience to a court order that will, on appeal, ultimately be found invalid or unjustified.[3]

The proper way to address this problem, in our view, is to assure that the adjudication of contempt is valid, and that incarceration (or continued incarceration) is an appropriate sanction, by subjecting such orders to prompt and meaningful appellate review.

For these reasons, we suggest that rather than imposing a cap on incarceration, Congress establish instead an expeditious and searching appellate review of orders imposing incarceration for civil contempt. Appeals from adjudications of civil contempt where incarceration is imposed should be placed on a very fast track. And expedition of the appeal should also be accompanied by an expansion of the appellate court's substantive role. At present, appeals in contempt cases are reviewed under an "abuse of discretion" standard—in other words, the court of appeals gives great deference to the trial court's decision to impose incarceration and will reverse that decision only where it is clearly wrong. In our view, the statute should be amended to provide that court of appeals will review the decision to impose incarceration without deference to the decision of the trial court, and that it may for that purpose, appoint a special master to take testimony or hear evidence if the court deems it appropriate to do so.

We also think it is important that persons facing incarceration be represented by counsel. As everyone knows, indigent defendants in criminal cases must, as a matter of constitutional right, be provided with counsel at government expense. In civil cases, by contrast, counsel are not ordinarily appointed. In our view, however,

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[3] We are also concerned, from the viewpoint of the contemnor, about the likely effects of establishing a cap on incarceration. All too often, experience teaches, floors become ceilings and ceilings become floors. If there is a 12-month limit on incarceration for civil contempt, we think it is quite likely that any inquiry to determine whether coercion has become punishment will not be seriously made during those 12 months, and that 12 months will become, in effect, the minimum time that contemnors will be confined unless they release themselves by complying with the court order. For this reason, we think it is important that any legislation on this subject explicitly provide that it is not in derogation of the common law rule that incarceration should cease when it no longer serves a coercive purpose.

no person should be incarcerated (except for the unavoidable period of detention immediately after arrest in criminal cases) without having had the opportunity to be represented by counsel. Accordingly, we urge that any legislation provide for the appointment of counsel for indigent persons charged with civil contempt and facing possible incarceration as a sanction.[4]

As everyone knows, H.R. 2136 and several similar bills were introduced in response to the case of Dr. Elizabeth Morgan, who is currently confined in the D.C. jail for refusing to disclose the whereabouts of her daughter. Her case has excited a great deal of public interest, and has aroused strong feelings on both sides. Many years ago, Justice Oliver Wendell Holmes, Jr., warned us of the dangers of deciding important issues in the context of such cases, because of their—

> immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities Co. v. *United States,* 193 U.S. 197, 400–401 (1904) (Holmes, J., dissenting). We therefore hope that congressional views about the Morgan case, whatever they may be, do not control Congress' deliberations and decisions on these much broader and very important issues.[5]

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[4] Our suggestion is that counsel be appointed to represent an indigent person only with respect to the contempt issue, not with respect to the merits of the underlying civil litigation to which he or she is a party.

[5] By unhappy coincidence, there is now before the courts another tragic case involving lengthy incarceration for contempt of court amidst allegations of child abuse. In this case, however, the person being held in jail is the same person who is accused of child abuse. Ms. Jacqueline Bouknight has been in the Baltimore City Jail since April, 1988, for refusing to obey a court order to disclose the whereabouts of her son, whom she is suspected of having abused or killed. See "High Court to Weigh Rights of Md. Mother, Missing Child," The Washington Post, July 10, 1989, at A–1. The Maryland Court of Appeals ordered to be released on the grounds that the court order compelling her to disclose the whereabouts of her son violated her right against self-incrimination under the Fifth Amendment, but the United States Supreme Court ordered her to be kept in jail pending its review of that decision. See *Baltimore City Dep't of Social Service* v. *Bouknight,* 109 S. Ct. 571 (1988) (granting stay); 109 S. Ct. 1636 (1989) (granting certiorari). Had Ms. Bouknight's case been in the District of Columbia and had H.R. 2136 been in effect, she would have been released from jail three months ago, with the whereabouts of her son still unknown. If the facts of the Morgan case are instructive on the subject of incarceration for contempt, so are the facts of the Bouknight case.

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